in the

Supreme Court

of the

United States

CASE NO: 79-229

CELIO CASTRO,
RALPH ALFONSO
ALBERT GREENE, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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CASE NO:

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ALBERT GREENE, JR.,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Fifth Circuit Court of Appeals entered in the above styled case on June 6, 1979, rehearing denied July 18, 1979.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at F.2d and is printed in the Appendix.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 6, 1979. Rehearing was denied on July 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Customs lacks the authority under 19 U.S.C. 1581 to board an American vessel in inland waters when no recent nexus to the border can be established?

2. Whether Petitioners CASTRO and ALFONSO were denied their constitutional rights of confrontation as to the pre-trial statements of co-Petitioner GREENE?

3. Whether an inventory search may not extend to items which are not on their face recognized as being contraband or evidence?

4. Whether the trial court improperly refused to instruct the jury during the giving of the charge to consider the voluntariness of Petitioner's CASTRO confession?

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Petitioners herein, CELIO CASTRO, RALPH ALFONSO and ALBERT GREENE, JR., were brought to trial pursuant to an Indictment returned by the Grand Jury on March 30, 1978, charging them with conspiracy to possess marijuana with intent to distribute and with possession of marijuana with intent to distribute. (A-R 10-11; G-R 1, 2). Petitioners' original motion to suppress physical evidence was filed on May 31, 1978. (A-R 108-16). The Government's response was

filed on June 6, 1978. (A-R 125-29). The Government filed an additional Memorandum of Law on June 20, 1978, (A-R 141-44) as did the Petitioners on June 19, 1978 (A-R 181-96).

The record and recommendation of the United States Magistrate, Robert Crongeyer, Jr., denying the motion to suppress was filed on June 22, 1978 (A-R 176-80). Motion to Reconsider and supporting affidavit was filed on behalf of the Petitioners on June 23, 1978 (A-R 154-74). The Order denying suppression was filed by Chief Judge Winston E. Arnow, on June 23, 1978 (A-R 175).

After a trial on the merits, the jury returned a guilty verdict as to both counts of the Indictment on June 30, 1978 as to Petitioners CASTRO and ALFONSO. (A-R 227-28). Both Petitioners, CASTRO and ALFONSO, were sentenced to concurrent terms of five years imprisonment to be followed by a special parole term of two years pursuant to 21 U.S.C. 841(b)(1)(B) (A-R 229-29a). Notice of Appeal was timely filed on August 3, 1978 (A-R 230).

After a trial on the merits, the jury returned a guilty verdict as to both counts of the Indictment against Petitioner GREENE on September 20, 1978 (G-R 26a). Petitioner GREENE was sentenced to concurrent terms of five years of imprisonment to be followed by a special parole term of two years pursuant to 21 U.S.C. 841 (b)(1)(B). (G-R 27). Notice of Appeal was timely filed on October 11, 1978 (G-R 31).

The United States Court of Appeals for the Fifth Circuit entered a written opinion affirming Petitioners convictions on June 6, 1979 (See Appendix). Motion for Rehearing was denied by the Court on July 18, 1979. This Petition for Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

The testimony on the motion to suppress physical evidence was heard by the court prior to the severance of Petitioners' cases. Testimony was taken on the motion to suppress in open court on June 15, 1978. Joseph Cunha testified that on December 29, 1978, he was employed as a supervisory customs control officer in Panama City, Florida (ATR II-12). The day prior, Officer Cunha had received information from customs officer Walter Scruggs to be on the lookout for the vessel "Tinila". This request was initially made by Border Marine Patrol Officer Rowell (ATR II-13-4). The information received was that a shrimp boat captain reported to the Marine Patrol that a vessel "Tinila" was observed approximately five to six miles off shore of St. George Island and that high speed boats were seen coming to and from the vessel (ATR II-14). The observation of the vessel "Tinila" upon which this relayed information was based, was made on December 27, 1978 (ATR II-57). It was admitted by Agent Cunha that no direction was given as to the relationship between the vessel "Tinila" and St. George Island. As such, it was quite possible that the vessel was within the inland waters at the time of this initial observation (ATR II-54-5). Since a records check indicated that the "Tinila", although hailing from Key West, did not appear to have vessel

documentation of record (ATR II-21), she was put under surveillance and eventually boarded (ATR II-35-6).

Agent Cunha further testified that upon his observing the vessel "Tinila", the boat was headed east bound toward international waters (ATR II-27), and was in fact stopped twenty (20) miles from international waters (ATR II-63). Not only was Customs surveillance of the "Tinila" made solely within inland waters (ATR II-65-7), but the "Tinila" was not even arguably within international waters on either December 28th or December 29th (ATR II-71). In fact, Agent Cunha, who supervised the boarding by Customs Officers Patterson and Jaszenko, admitted that he did not know whether the vessel "Tinila" had ever been in foreign waters (ATR II-81).

Lewis Patterson, supervisor for the Customs Patrol Office in Panama City, Florida, testified that upon his approaching the vessel "Tinila", that, "the vessel seemed to be listing to one side and the bow of the vessel appeared to be heavily damaged" (ATR II-103). Upon boarding the vessel "Tinila" in order to examine her documents and voyage data (ATR II-107) pursuant to 19 U.S.C. 1581 (ATR II-161), Customs Agent Patterson observed what appeared to be marijuana on the deck of the vessel (ATR-II-108). After testing the material, the Petitioners were placed under arrest (ATR II-110-11). A further search of the vessel after the Petitioners were placed under arrest, revealed residue on a paper plate in the crew's quarters (ATR-II-113), marijuana in a suit case (ATR-II-113), marijuana in what was being used as pillow (ATR-II-117), and marijuana in an empty radio box (ATR II-118).

A stipulation was entered between counsel that the movement of the vessel "Tinila" was toward the east on inland waters traveling toward international waters (ATR II 162-164). And it was clearly established by the evidence that the information which was received concerning the whereabouts of the vessel "Tinila" on December 27, did not specify the exact location of the ship.

> Q. If he were five miles west, he would be in St. George Sound, which is inland waters, right?
>
> A. If he was five miles south . . .
>
> THE COURT: Mr. Daniel, I hate to interrupt, but, I think we've pretty well covered out. It could have been any side of the island at any distance.
>
> MR. DANIEL: You're right, your (sic) exactly right. I'll let it go. (ATR-II-131).

As to Petitioners' CASTRO and ALFONSO, trial commenced on June 29, 1978. Agent Cunha testified consistently with his prior testimony at the motion to suppress adding that local state police were called in due to the "small amount" of contraband involved (ATR IV-21). During the testimony of Customs Officer Lewis Patterson, the court admitted into evidence statements by Petitioner CASTRO which were self-incriminatory. The Court, after hearing, determined that the statements were voluntary (ATR IV-146) and

instructed the jury to make their own determination of voluntariness (ATR IV-147-8).

At this time, various chain of custody witnesses were presented to the jury. The Chemist testified that the substance found on the boat was in fact marijuana (ATR IV-230).

It was at this time that Agent Patterson testified that he had removed a piece of paper from the wallet of Petitioner CASTRO written in Spanish (ATR-IV-234). This piece of paper proved to be a code for the location of marijuana deliveries to be made (ATR IV-243-4). This folded piece of paper was allegedly found by Agent Patterson during an inventory search of Petitioner CASTRO's personal belongings (ATR IV-257). This is true although the wallet had already been taken from the possession of Petitioner CASTRO, and was in the custody of the policy agency (ATR IV-258). This slip of paper was then confiscated by authorities even though Agent Patterson admitted that he did not know what the piece of paper in fact was (ATR IV-260). Furthermore, Officer Thomas Turk testified that the purpose of the search was to look for evidence and not for the protection of inventory (ATR IV 276).

At the conclusion of the case, Petitioner CASTRO specifically requested that the jury be instructed that they are to make a determination as to voluntariness before considering his pretrial statements. This request was denied by the Court (ATR IV-294-5).

The jury returned a verdict of guilty as to both Petitioners on both the conspiracy and the possession with intent to distribute counts (A-R 227-28). After the

imposition of sentence on August 2, 1978, an appeal to the Fifth Circuit Court of Appeals was timely taken. Affirmance was entered by written opinion on June 6, 1979, rehearing denied July 18, 1979. This Petition for Writ of Certiorari follows.

As to Petitioner GREENE, trial commenced on September 20, 1978. Agent Joseph Cunha testified consistently with his prior testimony at the motion to suppress, as did Agent Jazenko and Patterson.

At this time, various chain of custody witnesses were presented to the jury and the chemist testified that the substance found on the boat was, in fact, marijuana. (G-TR 121). The jury returned a verdict of guilty as to Petitioner GREENE on both the conspiracy and possession with intent to distribute counts (G-R 26a). After the imposition of sentence on October 11th, 1978 (GR 27), an appeal to the Fifth Circuit Court of Appeals was taken. An affirmance and written opinion was entered by the United States Court of Appeals for the Fifth Circuit on June 6, 1979; rehearing denied July 18, 1979. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING WRIT

I

CUSTOMS LACKS THE AUTHORITY UNDER 19 U.S.C. 1581 TO BOARD AN AMERICAN VESSEL IN INLAND WATERS WHEN NO RECENT NEXUS TO THE BORDER CAN BE ESTABLISHED.

At the motion to suppress, both Customs Agents Patterson and Cunha justified their boarding of the vessel "Tinila" upon the authority allegedly contained in 19 U.S.C. 1581(a). 19 U.S.C. 1581(a) provides that:

> Any officer of the Customs may at any time go on board of any vessel or vehicle at any place in the United States or within the Customs waters or, as he may be authorized, within a Customs Enforcement area established under Section 1701 and 1703-11 of this title, or any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle and use all necessary force to compel compliance.

Such a general and apparently absolute right to board is, however, limited by both Constitutional and statutory limitations. Since 19 U.S.C. 1581 is specifically a statute authorizing the boardings of vessels for the enforcement of Customs regulations, it must be remembered that, "the primordial purpose of a search by Customs officers is not to apprehend the persons, but to seize contraband and property unlawfully imported or brought into the United States." *Alexander v. United States,* 362 F.2d 379 (Cir. 1966). Generally speaking, "it would thus appear that Section 581 (19 U.S.C. 481, now 19 U.S.C. 1581) applies only to vessels arriving in or bound for the United States in carrying goods or persons from foreign ports." *Fish v. Brophy,* 52 F.2d 198 (1931).

This concept that a vessel must first cross a border before Customs may invoke their authority under 19 U.S.C. 1581, has been followed in several cases, including *United States v. Caraway,* 474 F.2d 25 (5 Cir. 1973), vacated en banc as moot, 483 F.2d 215 (5 Cir. 1973). Although it is not necessary for Customs agents to visually observe the vessel as it crosses the imaginary line which delineates international from inland waters, agents still must be able to point to some evidence which allows them to reasonably believe that the vessel to be boarded has recently been in international waters.

United States v. Ingham, 502 F.2d 1287 (5 Cir. 1974). "At the time of the search, the suspect must have had some reasonably direct connection with the border, considering such factors as the cause for initiation of the search, the distance from the border, and the original point of entry, and the time elapsed since entry." *United States v. Soria,* 519 F.2d 1060 (5 Cir. 1975). Simply stated, in order to invoke the authority created by 19 U.S.C. 1581, it is first necessary that there exist, "a high degree of probability that a border crossing took place". *United States v. Brennan,* 538 F.2d 711 (5 Cir. 1976).

In the case at bar, information was received by Agent Scruggs from an Officer Rowell of the Border Marine Patrol that an unknown shrimp boat captain had seen the vessel "Tinila" five to six miles offshore of St. George Island on December 27 (ATR-II-14). The original source of this information was never revealed (ATR-II-76). Officer Cunha testified that the direction of the vessel "Tinila" in relation to St. George Island had not been specified and that it was possible, based upon the information received, that the vessel "Tinila" had in fact been in inland waters when observed by this

unidentified confidential informant on December 27th (ATR II-54-5). Not only did Agent Cunha testify that he did not whether the vessel "Tinila" had ever been in foreign waters (ATR-II-81), but the Court on cross examination of Agent Patterson stated that, "Mr. Daniel, I hate to interrupt, but, I think we've pretty well covered out. It could have been any side of the island at any distance" (ATR II-131).

When Customs agents first made visual contact with the vessel "Tinila" on December 29th, the vessel was in inland waters. The vessel was observed traveling east bound toward international waters (ATR II-27). At the time of being stopped by the Customs agents, the vessel "Tinila" was still twenty (20) miles from international waters (ATR II-63). At all times while under surveillance of Customs officers, the vessel "Tinila" remained within inland waters (ATR II-65). Furthermore, Agent Patterson testified that, "the vessel seemed to be listing to one side and the bow of the vessel appeared to be heavily damaged." (ATR II-103).

Although the vessel "Tinila" was found approaching the bay, "a bay adjacent to an ocean is a functional equivalent of a border only with respect to vessels which have traveled in foreign waters before entry." *United States v. Solmes,* 527 F.2d 1370 (9 Cir. 1975). In the case at bar, there is no evidence to support the theory that there existed a recent nexus with the border. First of all, no testimony was presented that the vessel "Tinila" had ever been observed in international waters. Even though the actual crossing from international to inland waters need not be observed by Customs agents, there must be some evidence that the vessel to be boarded had in fact been in international

waters. *United States v. Ingham,* supra. For example, in *United States v. Ingham,* supra, the vessel was observed in a foreign port on the same day that the vessel therein was found in an American port.

One factor to consider in determining whether or not there exists reasonable evidence upon which to base a belief that the vessel to be searched had recently been in international waters, is the direction in which the vessel is found to be headed when first observed by Customs agents. For example, if the boat, as in the case at bar, was found to be headed toward the border, as opposed to away from it, it is not reasonable to assume that the vessel is coming from international waters. *United States v. Soria,* supra. Another factor to be considered is the condition of the boat, that is whether or not the vessel was sea worthy for the purpose of traveling in international waters. *United States v. Williams,* 544 F.2d 807 (5 Cir. 1977). In the case at bar, the vessel "Tinila" was found to be heavily damaged and listing (ATR II-103).

United States v. Williams, supra, is particularly instructive on this point. In *Williams,* Customs agents in Panama City, Florida, under the specific authority of 19 U.S.C. 1581(a) boarded a houseboat which was traveling exclusively in inland waters.

> The Government contends that because of the proximity of the marina to international waters, the statute supports entry of the vessel to inspect registration papers and ownership documents on a showing of 'suspicious circumstances.' Further, the Government asserts

that the unusual design of the craft and absence of registration number furnished the suspicious circumstances. Once the agents were legally aboard the vessel, the Government argument runs, observation of contraband in plain view raised a reasonable suspicion of the presence of other contraband, justifying a warrantless full search in which an additional small amount of marijuana and some barbiturate pills were discovered.

The government's case cannot stand, however, because the initial boarding of the houseboat was unlawful. The Government seeks to justify the boarding and search of the houseboat under Section 1581(a). However, strict application of the literal terms of the Section to every vessel would 'subvert the Fourth Amendment. *United States v. Jones,* 9 Cir. 1975, 528 F.2d 303, 304. Some boardings and searches pursuant to Section 1581(a), not founded on probable cause or even suspicion, are reasonable under the Fourth Amendment. . .

In some, Customs enforcement concerns itself with certain vessels presumed to bear persons or cargos subject to Customs enforcement procedures. Vessels clearly falling within this class may be searched under Section 1581(a) without warrant, probable cause or suspicion. But vessels about which there is no apparent Customs concern or suspicion of law violation, may not reasonably be searched without warrant or probable cause.

Turning to the facts before us, we find that the Government reliance on Section 1581(a) in this case is misplaced. The record does not show that the Williams' houseboat had entered international waters. In deed, that it was even capable of venturing so far, or that it had contacted any other vessel which had been in international waters. The searching officers had no knowledge of articulable facts which, taken together with logical inferences from those facts, would cause them reasonably to believe that this vessel fell into Customs area of concern, or that a violation of the law was being committed on board. *United States v. Williams,* supra.

The Petitioners would respectfully submit that the case at bar is directly controlled by *United States v. Williams,* supra. In the absence of testimony or evidence upon which a reasonable belief can be established that the vessel "Tinila" had in fact been recently in international waters, Customs lacks authority to board a vessel pursuant to 19 U.S.C. 1581. Customs boardings must be limited to those areas which ware within the concern of the Department of Customs.

Furthermore, even assuming that the vessel "Tinila" had in fact been in international waters on December 27, Customs lacks jurisdiction to board the vessel on December 29th. It is generally accepted that Customs has the authority to board a vessel which has been in international waters once it crosses the border into inland waters. "Where, however, a search for contraband by Customs officers is not made at or in the im-

mediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed, as well as the manner and extent or surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was aboard the vehicle at the time of entry into the jurisdiction of the United States." *Alexander v. United States,* supra. Since the vessel "Tinila" was not under surveillance by Customs officers on December 27 and 28, the concept of extended border search could not be used to justify the search conducted on December 29. Since the legality of an extended border search is dependent upon the distance and the time from the crossing of the border, *United States v. Warner,* 441 F.2d 821 (5 Cir. 1971), the search of the vehicle which crossed the border two hours previous to the search and which was not kept under surveillance is deemed to be an invalid intrusion upon the occupants' Fourth Amendment rights. *United States v. Garcia,* 415 F.2d 1141 (9 Cir. 1969). Although a lack of surveillance for three hours has been deemed sufficient time in which to negate extended border search authorization, *United States v. Portillo,* 469 F.2d 907 (9 Cir. 1972), even a loss of surveillance of ten minutes has been deemed sufficient time to negate the presumption that the contraband items found during the search were on board the vehicle at the time of crossing the border. *United States v. Petersen,* 473 F.2d 874 (9 Cir. 1973).

Likewise, a four hour hiatus in surveillance has been deemed sufficient to invalidate an extended border search. *United States v. Hamilton,* 490 F.2d 598 (9 Cir. 1974). As held by the lower court in *United States v.*

Fogelman, 24 Crl. 2132 (10/11/78), the concept of an extended border search may have wide ramifications so long as there exists constant surveillance from the border to the point of ultimate seizure. However, in the case at bar where initial observation, assuming that said observation could be interpreted so as to place the vessel "Tinila" within international waters, was made on December 27th, and surveillance by Customs agents was not instituted until two days later on December 29th, it cannot be said that the opportunity did not exist for the condition of the vessel "Tinila" to have changed since the initial alleged border crossing. "At the time of the search, this car was remote in both time and space from the border. It had not recently, or 'just' crossed the border. There was no showing whatever that it contained goods which had just crossed the border illegally. There had been no continuous surveillance. Under the totality of the circumstances, the search was clearly illegal." *United States v. Majourau,* 474 F.2d 766 (9 Cir. 1973).

Nor does the lower court's recent opinion in *United States v. Freeman,* 24 Crl. 2003 (9/11/78) alter the requirement that a vessel must have some nexus to the border before being searched. Although *United States v. Freeman,* supra, specifically holds that "reasonable cause to suspect" is not a prerequisite to a border search pursuant to 19 U.S.C. 1581[1], the Court did not alter the

[1]In order to justify a border search, reasonable suspicion must exist necessitating the search. Cases, *Almeida-Sanchez v. U.S.,* 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d (1973). Even if an absolute statutory right exists, reasonable suspicion is still required by the constitution. "No act of Congress can authorize a violation of the Constitution." *U.S. v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

requirement that the vessel to be boarded must first have some nexus to the border. In *Freeman,* Customs officers first observed the vessel in international waters and then proceeded to board her once she entered inland waters.

Since, "the statutory authority under which border searches are conducted designate a border *crossing* . . . as the event giving rise to the authority to conduct a border search," *U.S. v. Storm,* 480 F.2d 701 (5 Cir. 1973), where there is no indication or record basis for believing that the vessel has recently crossed the border or been in contact with those who have, a border search is not justified. Since both Agent Cunha (ATR II-55,81) and the trial judge (ATR II-131) recognized that based upon the information received from an unidentified confidential informant, the vessel "Tinila" may never have been in international waters, it could not be said that the searching officers had the requisite knowledge or reasonable suspicion that the very individual or thing to be searched had in fact just crossed the border." *United States v. Lonabaugh,* 494 F.2d 1257 (5 Cir. 1973). Nor, due to the two day lag in surveillance, could it be stated with reasonable certainty "that any contraband which must be found in or on the vessel at the time of the search was aboard the vessel at the time of entry into the jurisdiction of the United States." *Alexander v. U.S.,* supra.

Thus, since no border crossing existed, nor in the least a recent border crossing, Customs lacked authority pursuant to 19 U.S.C. 1581 to board the vessel "Tinila". *Fish v. Brophy,* supra, and *United States v. Williams,* supra.

II

THE PETITIONERS', CASTRO AND ALFONSO, WERE DENIED THEIR CONSTITUTIONAL RIGHTS OF CONFRONTATION AS TO THE PRETRIAL STATEMENTS OF CO-PETITIONER GREENE.

In the case at bar, a controversy arose as to the introduction of co-Petitioner Greene's pretrial statements. Although Greene had originally been charged with Petitioners, Castro and Alfonso, his unavailability at trial necessitated a severance of the cases in fact. During the trial, however, references were made to Greene's pretrial statements.

Cross Examination of
Customs Officer Lewis Patterson
(ATR IV-182-3)

Q. Okay. And isn't it a fact that it was Albert Greene who had been smoking that cigarette?

A. He stated that that was his stash.

Q He stated that the marijuana was his stash, is that correct?

A. Yes, sir.

Q. He admitted it was his . . . .

Q. And Mr. Greene admitted it was his stash, correct?

A. Yes, sir.

Q. Now, the verbiage "stash", in case the jury doesn't know, that means his property?

A. Yes, sir.

Redirect Examination of
Customs Officer Patterson
(ATR IV-186-8)

Q. Can you explain to me the consistency between that statement and what you've testified to here today?

A. He stated that the marijuana was not his, as far as his solely, that he had been, he found the marijuana on the boat, did not know who it belonged to, and that this was his stash he was using to smoke out of that particular portion.

Mr. Entin: Your Honor, may I object and come side bar one more time?

The Court: Yes, Sir.

(At the bench)

The Court: Mr. Entin, I want to say something to you right now, sir. You opened up this whole key of worms. I do not like the way the testimony is going but you brought it out. You brought out the statement Greene made to him.

Mr. Entin: Your Honor, I'm not objecting to what Greene said.

The Court: You're objecting to everything else.

Mr. Entin: Your Honor, all the statements that Greene has allegedly previously given, according to Patterson, all his previous testimony from the discovery and from the prior hearing, Greene never once used the word, "Was not solely his", and he found it somewhere on the boat.

The Court: That's what he said here. I don't care what you think he's saying here. You did this on purpose, I'm afraid, you got into this secondhand, inadmissible hearsay.

Mr. Entin: I thought it was an admission against penal interest.

The Court: Against penal interest of whom?

Mr. Entin: Greene.

The Court: Greene is not on trial.

Mr. Entin: I can't use his testimony as exculpatory. You've estreated his bond.

The Court: That doesn't mean you can get into it. I don't like the way the case is going. You've opened up the door and given him

leeway. At the same time we're about to exhaust it, Don.

Mr. Modesitt: I'm finished.

Mr. James: Briefly, sir, I object —

The Court: You had full right to object when Mr. Entin came in. You sat back and when it started to your disadvantage you came along and objected, so you're overruled on the same basis. I do want us to be finished with the witness.

Mr. James: I think we're getting into a *Bruton* problem.

The Court: Mr. Entin started it.

Thus, the objection of confrontation based upon *Bruton v. United States,* 391 U.S. 123 was expressly raised by counsel for Petitioner CASTRO. Furthermore, as recognized by the court, "Mr. Entin, let the record show any objection made by anyone as joined by all of you." (ATR IV-7).

The portion of co-Petitioner's GREENE pretrial statement which was illicited through the redirect examination of Agent Patterson by the Government was permitted by the Court due to the Court's belief that counsel for Petitioner ALFONSO had "opened the door" and "invited the error". Such is, however, an inappropriate application of the invited error doctrine. It is generally accepted "that a defendant cannot obtain a reversal because of the admission of otherwise inadmissible evidence where the defendant himself has opened up the constitutionally forbidden subject matter. Sometimes called the doctrine of invited error, the accepted rule is that where the injection of allegedly inadmissible evidence is attributable directly to the action of the defense, its introduction does not constitute reversible error....Since the application of the invited Amendment right to confrontation, a purposeful rather than inadvertent inquiry into the forbidden matter must be shown." *United States v. Taylor,* 508 F.2d 761 (5 Cir. 1975). In the case at bar, defense counsel did not make a purposeful inquiry into forbidden matters.

Counsel for Petitioner ALFONSO clearly limited his inquiry as to co-Petitioner GREENE's pretrial statements to statements in which GREENE admitted his possession of the marijuana. Such third party confessions are clearly admissible under *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1975); *United States v. Guillette,* 547 F.2d 743 (2 Cir. 1976); and *United States v. Benveniste,* 564 F.2d 335 (9 Cir. 1977). And, Federal Rules of Evidence 804 (b) (3) specifically provides for the introduction of statements of third parties which were made against their penal interest.

Thus, those pretrial statements of co-Petitioner GREENE, which were against his penal interests by admitting possession, were introduced by counsel for Petitioner ALFONSO as an exception to the hearsay rule. However, no exception to the constitutional right of confrontation exists which would allow the Government to introduce non-inculpatory statements of co-Petitioner GREENE in the absence of his trial testimony. Since the initial inquiry by defense counsel

was in fact permissible, the concept of invited error cannot be relied upon to justify the government's actions. *United States v. Taylor,* supra.

As such, the Government's introduction of non-inculpatory pretrial statements of co-Petitioner GREENE in the absence of his trial testimony was a violation of Petitioner's constitutional rights of confrontation under the Sixth Amendment to the United States Constitution. Having not been invited through the previous introduction of any inadmissible evidence on behalf of Petitioners, invited error cannot be utilized to justify the government's improper inquiry.

III

AN INVENTORY SEARCH MAY NOT EXTEND TO ITEMS WHICH ARE NOT ON THEIR FACE RECOGNIZED AS BEING CONTRABAND OR EVIDENCE.

The testimony was presented at trial and evidence introduced as to a folded up piece of paper which was found in Petitioner CASTRO's wallet during an inventory search (ATR IV-257). The evidence was clear that the wallet had already been removed from the Petitioner and was in the custody of police personnel (ATR-IV-258). A search was then made of the wallet in the absence of a warrant (ATR IV-259). Agent Patterson further admitted that since the folded piece of paper was written in Spanish, he did not known what was written thereon (ATR IV-260). This piece of paper was revealed to be a list of locations to which marijuana was to be delivered (ATR IV-243).

In order to determine whether or not the search of the wallet was indeed an inventory search by federal agents while the Petitioner was in the custody of state agencies, testimony was presented by Bay County Sheriff's Deputy Thomas Turk:

> Q. Okay, is it normal inventory procedure for the jailer during an inventory search to take the wallet and pull every picture out of it and every paper out of it and open it up and read every paper or just take the wallet and put it in the envelope?
>
> A. They normally just put the wallet in the envelope.
>
> (ATR IV-271)
>
> Q. But, may it please the Court, the normal inventory practice in your department is they just take the wallet and the jailer just puts it in the envelope; he doesn't take each one of the little photograph things apart and doesn't unfold each piece of paper and he doesn't read whatever kind of papers you've got in there, correct?
>
> A. Not to my knowledge, no, sir.
>
> (ATR IV-273)

The Court: Now, the point they're raising with me is that that was not a proper inventory search, somebody was just in there absolutely searching for evidence because that's not customarily done on an inventory search.

A. Sir, the only thing I known (sic) about that document is that Captain Patterson had it in his custody.

The Court: My point to you, sir, is that there's some testimony here that your jailer was there and Captain Patterson was there and in the course of it they got this wallet out but they went into that wallet and found this paper.

A. I can't answer that, sir, because I wasn't there.

The Court: Well, you weren't there.

A. Yes, sir.

The Court: But within your area would that be what you would call a normal inventory search or a search for evidence?

A. No, sir, a drug-related arrest, as far as I'm concerned, what we do, it's normal.

The Court: But the reason it's normal is because you go in there to look for evidence?

A. Yes, sir.

The Court: You're not protecting inventory?

A. No, sir, we're looking for drugs, looking for evidence.

(ATR IV-274-76)

First of all, under the testimony cited above, it is clear that the search of Petitioner CASTRO's wallet once in the custody of the police agency was not an inventory search, but rather was search for evidence. Such a police station search after the property has already been removed from the possession of the Petitioner cannot be deemed incident to arrest. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston v. United States,* 376 U.S. 364, 85 S.Ct. 881 11 L.Ed.2d 777 (1964).

> Searches incident to lawful custodial arrests compromise one of the narrow exceptions to the general practice that searches are unconstitutional unless authorized by a prior judicial warrant. The exception serves two purposes. First, it allows the arresting officer to disarm the suspect, thus protecting the officer's safety and for closing the possibility of escape. Second, the exception permits the officer to prevent the suspect from destroying evidence. These twin goals simultaneously provide the justification for an incident search and its permissible limits. A lawful incident search cannot extend beyond the perimeters established by these goals. See *Chimel v. California,* 395 U.S. 752, 89 St.Ct. 2034, 23 L.Ed.2d 685 (19). *United States v. Edwards,* 554 F.2d 1331 (5 Cir. 1977), reverse other grounds 577 F.2d 883 (1978).

Once a defendant is in custody and his property removed from his possession, a search of the property cannot be justified as incident to arrest. "The search

was unrelated to the duties of the police as guardians of the prisoner's property, to inventory or to protect property in their hands for safe keeping. The clothing was not in danger of being removed elsewhere, as in the case of automobiles, or of being destroyed, and it was not available to appellant as the source of escape weapons . . . the fact that the police have custody of a prisoner's property for the purpose of protecting it while he is incarcerated does not alone constitute a basis for an exception to the requirement of a search warrant." *Brett v. United States,* 412 F.2d 401 (5 Cir. 1969).

In light of the fact that the trial testimony of Bay County Deputy Turk clearly shows that the search conducted by Agent Patterson was for evidence and not inventory, the inventory search rational cannot be relied upon. "The so-called inventory searches can, of course, be employed as subterfuges and can be the subject of abuse. It is temptingly simplistic to employ the phrase inventory as though uttering it solves everything, and all too easy to state over-broadly the interests which inventory searches vindicate, and to automatically give to those interests a primacy which, in the balance between public and private interests, they do not necessarily enjoy." *United States v. Grill,* 484 F.2d 990 (5 Cir. 1973). Inventory searches are valid only because they may attain three goals. They may protect the car owner's property while it remains in police custody, they may protect the police against disputes over lost or stolen property, and they may protect the police from danger. *South Dakota v. Opperman,* 428 U.S. 367, 96 S.Ct. 3096, 49 L.Ed.2d 1004. No such goals are attained through the confiscation of a folded piece of paper found within Petitioner's wallet, the nature of which was unknown at the time of seizure.

The case at bar is clearly opposite of the situation in *United States v. Lipscomb,* 435 F.2d 795 (5 Cir. 1970). In that case, the lower court upheld an inventory search of defendant's personal belongings which produced a key which proved beneficial to the prosecution. That Court held that, "Preston and Chimmel are thus inapposite in a case such as this, in which the police officers were not attempting to attain evidence but were simply following their standard procedure for the safe keeping of the accused's possessions . . . there is no testimony in the record indicating that the intention of the police officers in taking inventory of Lipscomb's belongings was to locate and confiscate evidence." Yet, in the case at bar, the testimony of Bay County Deputy Turk reveals that the "inventory search" conducted by Agent Patterson was not a standard inventory procedure, but was conducted for the specific purpose of locating and confiscating possible evidence. Since the purpose of the search was to locate evidence, the inventory rational may not be utilized to justify the actions of Agent Patterson.

Assuming arguendo that Agent Patterson had a right to look within Petitioner CASTRO's wallet, he had no right to unfold the folded papers and to read them. *Waine v. State,* 377 A.2d 509 (MD Ct. App. 1977) and *Boone v. State,* 383 A.2d 412 (MD Ct. App. 1978). Of particular import is the lower court's opinion in *United States v. Edwards,* supra. In that case, the initial panel ruled that it was improper for the police officers pursuant to an inventory search to read certain identification cards and credit cards which were found on the front seat of an impounded vehicle. This case was later reversed en banc not because the entire Court disagreed

with the above cited proposition of law, but rather because under the facts in the *Edwards* case, the police officers seized the evidence based upon the photograph on the identification card and not the words thereon. As such, the original holding of the panel decision in *Edwards* that police officers, pursuant to an inventory search may not read papers which are found, is still good law. *Waine v. State,* supra, and *Boone v. State,* supra.

Lastly, assuming that Agent Patterson had a right to read the folded up piece of paper which was found in Petitioner CASTRO's wallet pursuant to an inventory search, Agent Patterson admitted that he did not know what the piece of paper was (ATR IV 260) and that the piece of paper had to be translated by another (ATR IV 235-7). It is generally recognized that, "in the case of 'mere evidence', probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967):

> Even assuming the discovery of the ledger to have been inadvertent, however, the evidentiary value of the columnar pad was not immediately apparent to the officers . . . we do not conceive how the officers, when confronted with a common columnar pad, without any notation on its cover, would reasonably have concluded that its contents would reveal a connection to the narcotics and firearms lawfully sought . . . even if the search warrant provided justification for a cursory examination of the box and its contents, when the officers examined the contents of a bound, closed and

> outwardly innocuous columnar pad, they entered the impermissible realm of the exploratory search. *State v. Shinault,* 24 Cr. L. 2058 (Ariz. Ct. App. 1978).

As in *Shinault,* it was improper for the officers herein to confiscate a folded piece of paper found in Petitioner CASTRO's wallet which from its appearance, in the absence of a translation which was obtained after the seizure, was innocuous. Such a seizure of "mere evidence" which is not on its face recognized as having immediate and appropriate application to the pending criminal investigation, is in violation of the Fourth Amendment to the United States Constitution in the absence of a warrant.

Thus, since the confiscation of a folded piece of paper found within Petitioner CASTRO's wallet cannot be justified as being incident to arrest, did not serve the purpose of an inventory search, could not be unfolded and read, and in the absence of facial recognition could not be seized as "mere evidence", the seizure must be deemed unconstitutional.

IV

THE TRIAL COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY DURING THE GIVING OF THE CHARGE TO CONSIDER THE VOLUNTARINESS OF PETITIONER CASTRO'S CONFESSION.

Over objection, the trial judge ruled certain statements made by Petitioner CASTRO to be voluntary and

admissible (ATR IV-146). 18 U.S.C. 3501 (A) in part provides that, "if the trial judge determines that the confession was voluntarily made, it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all circumstances". The giving of said instruction is mandatory on the court, *Mullins v. United States,* 382 F.2d 258 (4 Cir. 1967), to the extent of being plain error which may be raised even in the absence of objection. *United States v. Barry,* 518 F.2d 342 (2 Cir. 1975). This instruction must inform the jury that they may determine the voluntariness of the statement and that the proof of voluntariness must be beyond a reasonable doubt. *United States v. Thomas,* 475 F.2d 115 (10 Cir. 1973).

The instruction was specifically requested by defense counsel and refused by the court:

> The Court: Let's look at them right now and see if there's argument about them. I've already given admissions and confessions. I don't need to give it about voluntariness.
>
> Mr. James: Yes, I think you do. I request it. We're entitled to it twice.
>
> The Court: It doubles it up. I don't know why I should give it twice.
>
> Mr. James: Give me some break, Judge.
>
> The Court: I gave it to you already. I don't ordinarily do it when I did.

> Mr. James: All I can do is request it, sir.
>
> The Court: I don't like to give long instructions and I've already got this one. I'll let it go.
>
> (ATR IV-294-5)

The Petitioners would respectfully submit that they were entitled to an instruction during the jury charge that it was the duty of the jury to make a determination of voluntariness of Petitioner CASTRO's confession pursuant to 18 U.S.C. 3501. The failure to give this mandatory instruction constitutes reversible error. *Mullins v. United States,* supra, and *United States v. Barry,* supra.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

/s/_____

ALVIN E. ENTIN, ESQ.
2020 NE 163 Street, Suite 300
North Miami Beach, FL 33162
305/944-9100

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals was this day of August, 1979, mailed to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20543 and to the Office of the United States Attorney, Post Office Box 1380, Tallahassee, FL 32302.

BY /s/_____
ALVIN E. ENTIN, ESQ.

Appendix

APPENDIX

UNITED STATES v. CASTRO

UNITED STATES of America,
Plaintiff-Appellee,

v.

Celio CASTRO and Ralph Alfonso,
Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Albert GREENE, JR.,
Defendant-Appellant.

Nos. 78-5510, 78-5660
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

June 6, 1979.

Defendants were convicted in United States District Court for the Northern District of Florida, Winston

*Rule 18.5 Cir.; see Isbell Enterprises, Inc v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

E. Arnow, Chief Judge, of conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute. Defendants appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) customs agents possessed sufficient articulable facts to support an inference that a shrimper was involved in smuggling contraband and to go aboard to determine the vessel's identity and documentation; (2) a defendant's right to confrontation under *Bruton v. United States* could be violated by admission of extrajudicial statements not directly alluding to defendant, and (3) a search of defendant's person incident to arrest could properly include an inspection of the contents of his wallet and that search could be delayed until his arrival at the place of detention.

Affirmed.

1. Arrest — 63.5(4)

Recent nexus to border is not prerequisite for investigatory stop based on reasonable suspicion.

2. Customs Duties — 126

Where speed boats were observed going to and from shrimper in area that was known for contraband smuggling, vessel of the same name and matching description was observed later that day on Intracoastal Waterway heading toward open waters and customs agents were informed by Coast Guard that no vessel of that name was documented, there was sufficient articulable facts to support inference that shrimper was involved in smuggling contraband and to warrant boarding to determine its identity and documentation.

3. Criminal Law — 662(1)

Defendant's right of confrontation under *Bruton v. United States* could not be violated by admission of statements which did not directly allude to defendant, but instead to his codefendant.

4. Arrest — 71.1(6,8)

Search of defendant's person incident to arrest could include inspection of contents of his wallet and unfolding and reading of paper found therein, and that search could be conducted later when accused arrived at place of detention.

5. Criminal Law — 806(1)

Where defendant requested and received jury instruction regarding voluntariness of his confession immediately before confession was introduced, defendant could not insist on duplicate instruction given amid general jury charge.

Appeals from the United States District Court for the Northern District of Florida.

Before CLARK, GEE, and HILL, Circuit Judges.

GEE, Circuit Judge:

Appellants Celio Castro, Ralph Alfonso and Albert Greene, Jr. were jointly indicted for conspiracy to possess marijuana with intent to distribute and for possession thereof with intent to distribute, violations of 21 U.S.C. §§ 841(a)(1) and 846. Greene failed to appear

for trial at the appointed hour and was later tried separately; all were convicted and now appeal. All urge that the customs' search of the shrimper on which they were arrested was unconstitutional. Castro and Alfonso additionally complain of the admission of an out-of-court statement by Greene, about the admission of a list found in Castro's wallet after arrest, and about the jury charge concerning the voluntariness of Castro's confession. Finding no merit in their various arguments, we affirm.

Around 8:00 a.m. on December 29, 1977, officers of the U.S. Customs Service stationed at Panama City, Florida, received word from a Florida Marine Patrol officer that an unknown shrimp boat captain had reported observing a shrimp boat named TINILA five to six miles from St. George Island, an offshore island running roughly parallel to the Florida panhandle near Apalachicola. The area is a known scene of contraband smuggling. The captain had seen high speed boats going to and from the TINILA, which he described as a 65 to 70 foot shrimp boat, white with blue trim, with the home port of "Key West, Florida," painted on the stern. Though a customs officer testified that he understood the report as meaning that the vessel was south of the island and therefore in international waters in the Gulf of Mexico, it is apparently admitted that the vessel might have been to either side of, or even north of, the island and thus possibly in intracoastal or other national waters when it was observed by the shrimper.

Around 1:30 p.m. that day, a vessel named TANILA and matching the description of the vessel reported earlier was observed passing under a bridge on

the Intracoastal Waterway near Choctawhatchee Bay. It was heading eastward toward the open waters about 20 miles distant. Customs agents checked with the Coast Guard documentation officer in Washington, D.C. and were informed that no vessel of the name TANILA was documented. Three customs officers intercepted the vessel as it reached the West Bay Bridge and boarded to determine the boat's nationality, to check its documentation, and to determine whether the boat had come from foreign waters. One officer went immediately to the cabin to inspect the documents but none were produced. Another officer simultaneously observed marijuana debris scattered loosely about the open deck. After a field test verified the nature of the marijuana, the appellants were arrested and the vessel was seized. The officers continued to search the boat as it was escorted to port. In the crew's cabin they found a paper plate holding marijuana residue and a marijuana cigarette. A grocery bag full of marijuana was found in Greene's bed. Greene admitted that it was his "stash." A box of the substance was also found in the captain's quarters. Castro stated that it was his, that Santa Claus had given it to him.

[1,2] Since there had been no known, recent "nexus" to the border, appellants argue that the customs agents exceeded their constitutional authority in boarding and searching their boat, which had been observed by the officers only in inland waters. This theory fails. A recent nexus to the border is not a prerequisite for an investigatory stop based on reasonable suspicion. *United States v. Whitmire,* slip op. 5272 F.2d (5th Cir. 1979) [No. 77-5359]. At the time of the boarding, the customs agents possessed sufficient articulable facts to support an inference that the

TANILA was involved in smuggling contraband. Boarding to determine the vessel's identity and documentation was a reasonable response to that suspicion. Once aboard, the agents saw marijuana debris in "plain view" upon the deck, providing probable cause for an intensive search of the vessel. *United States v. Freeman,* 579 F.2d 942, 947-48 (5th Cir. 1978). On this record we decline to reach the question whether customs' statutory authority under 19 U.S.C. § 1581(a) constitutionally allows the boarding of a vessel sighted initially in inland waters, even absent reasonable suspicion. *See United States v. Whitaker,* 592 F.2d 826 (5th Cir. 1979); *United States v. Freeman,* supra, in which that question was decided as to vessels sighted in "customs waters" and boarded there or subsequently in intracoastal waterways.

[3] The second point of error involves the use at Alfonso and Castro's trial of Greene's post-arrest statements. While cross-examining one of the arresting customs officers, the attorney for appellant Alfonso sought to shift blame to the absent Greene by asking whether Greene was the person aboard who had been smoking marijuana. The officer replied that Greene had admitted he had been smoking from his "stash." Alfonso's counsel continued into this area and even asked the officer whether the "verbiage 'stash'" indicated that it was Greene's property. On redirect examination the prosecutor elicited further information about Greene's statement. Greene had told the officer that the marijuana was not solely his, that he had found it on the boat, that he did not know who owned it, and that he had been smoking a bit out of a particular portion that was his stash.

Despite having opened up this area in an effort to possibly mislead the jury into thinking that the absent Greene owned the marijuana aboard, Alfonso, joined by Castro, now argues that his rights of confrontation under *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), were violated by the further testimony regarding Greene's statement. We disagree. *Bruton* rights are violated only by admission of extrajudicial statements *implicating* the complaining defendants. *United States v. Roach,* 590 F.2d 181, 185 (5th Cir. 1979). Where, as here, a statement does not *directly* allude to the defendants, *United States v. Hicks,* 524 F.2d 1001, 1003 (5th Cir. 1975), cert. denied, 424 U.S. 946, 96 S.Ct. 1417, 47 L.Ed.2d 353; 426 U.S. 953, 96 S.Ct. 1729, 48 L.Ed.2d 197, *rehearing denied,* 426 U.S. 930, 96 S.Ct. 2640, 49 L.Ed.2d 382 (1976): *United States v. Grillo,* 527 F.2d 1344 (5th Cir. 1976), no rights are abridged. Even were the Greene statements more incriminating as regards Alfonso, we would be loath to reverse on his account since it was his deliberate trial strategy to open up the area.

[4] In their next point of error, Alfonso and Castro argue that the exclusionary rule required suppression of a folded piece of paper found in Castro's wallet during a search at the jail. The paper, written in Spanish, appeared to be a list of locations to which marijuana was to be delivered. They argue that this was not a search incident to arrest since it was delayed. They claim in addition that inventory search concepts cannot justify the warrantless reading of a folded paper in a wallet, since the normal practice at that jail was to inventory a wallet as a whole after money had been removed therefrom and counted. We need not reach the latter issue because we find that the search of Castro's person and his im-

mediate personal effects for evidence was a valid search incident to arrest. It is clear from *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), that, as contrasted with a search of the premises in which an arrestee is apprehended, a warrantless search of the *person* incident to a custodial arrest may include a full inspection to discover evidence of crime or fruits thereof, in addition to the disarming of a suspect. And *United States v. Edwards,* 415 U.S. 800, 803, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771 (1974), established that searches and seizures that could be made "on the spot at the time of arrest" may legally be conducted later when the accused arrives at the place of detention. *Brett v. United States,* 412 F.2d 401 (5th Cir. 1969), on which appellants rely, may not survive *Edwards.* In any case, however, the *Brett* search that occurred three days after arrest is distinguishable from searches following closely upon incarceration. *See, e. g., United States v. Gonzalez-Perez,* 426 F.2d 1283 (5th Cir. 1970). Under these principles the folded paper was properly seized and admitted into evidence.

[5] As a final point of appeal, Castro urges that the trial court erred in refusing to give a requested jury instruction regarding the voluntariness of his confession. He had requested and received an identical instruction immediately before the confession had been introduced on the theory that the instruction was very important, and he didn't want it "buried in all the general instructions." Having requested and received the courtesy of an early instruction, he cannot now successfully claim that the court abused its discretion in refusing to give a duplicative instruction amid the general jury charge.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NOS. 78-5510 and 78-5660

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CELIO CASTRO and RALPH ALFONSO,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALBERT GREENE, JR.,
Defendant-Appellant.

MOTION FOR REHEARING

COME NOW the Appellants, CELIO CASTRO, RALPH ALFONSO and ALBERT GREENE, JR. and petition this Honorable Court for a Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure and would allege in furtherance thereof as follows:

1. The Court in its opinion dated June 6, 1979, failed to consider Appellants' argument that Customs lacked authority under 19 U.S.C. §1581 (a) to board a vessel in the absence of at least a reasonable suspicion that the vessel had come from international waters and was subject to Customs' jurisdiction. *United States v.*

Caraway, 474 F. 2d 25 (5 Cir. 1973); *United States v Ingham,* 502 F. 2d 1287 (5 Cir. 1974); and *United States v. Brennan,* 538 F. 2d 711 (5 Cir. 1976).

2. In light of the fact that the Tanila was observed in a listing and damaged condition making it not seaworthy and that it was only found in a bay and not the ocean, a reasonable suspicion that the vessel had come from international waters could not be established. *United States v. Williams,* 544 F. 2d 807 (5 Cir. 1977) and *United States v. Solmes,* 527 F. 2d 1370 (9 Cir. 1975).

3. This Honorable Court also failed to consider argument of Appellants that the staleness of the information received as to the motor vessel Tanila's location rendered the search unjustified. *United States v. Garcia,* 415 F. 2d 1141 (9 Cir. 1969); *United States v. Hamilton,* 490 F. 2d 598 (9 Cir. 1974); and *United States v. Fogelman,* 24 Cr. L. 2132 (10-11-78).

4. As to Appellants' second issue, the Appellants would respectfully submit that this is not a case of invited error into forbidden areas as prohibited by *United States v. Taylor,* 508 F. 2d 761 (5 Cir. 1975). Rather the testimony elicited by defense counsel was a limited inquiry of third party confessions as recognized in *Chambers v. Mississippi,* 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1975); *United States v. Guillette,* 547 F. 2d 743 (2 Cir. 1976); and *United States v. Benveniste,* 564 F. 2d 335 (9 Cir. 1977). See also, Federal Rules of Evidence 804 (b) (3).

5. As to Appellants' third point on appeal, assuming as the Court has indicated in its opinion that the

search of Appellant Castro's wallet was justified, this still begs the question of whether or not the seizure of a folded piece of paper found within his wallet was legal.

6. In the case of *United States v. Edwards,* 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974) relied upon by the Court, the evidence sought to be introduced were the clothes worn by the defendant in that case. His clothing was easily recognized as being potential evidence in the case by its mere appearance. In the case at bar, however, Agent Patterson unfolded pieces of paper found in Appellant Castro's wallet in order to read them. It is the reading of these papers which Appellant challenges as being unconstitutional in the absence of a warrant. *Wayne v. State,* 377 A. 2d 509 (MD. App. 1977), *Boone v. State,* 338 A. 2d 412 (MD. App. 1978), and *United States v. Edwards,* 554 F. 2d 1331 (5 Cir. 1977).

7. Furthermore, assuming that Agent Patterson had a legal right to read the folded up piece of paper, he admitted that he did not know the meaning or significance of that item (TR 4-260).

8. As recognized by the United States Supreme Court in *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967): "In the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." As more fully explained in *State v. Shinault,* 24 Cr. L. 2058 (Ariz. App. 1978):

> Even assuming the discovery of the ledger to have been inadvertant, however, the evidentiary value of the columnar pad was not im-

> mediately apparent to the officers . . . We do not conceive how the officers, when confronted with a common columnar pad, without any notation on its cover, would reasonably have concluded that its contents would reveal a connection to the narcotics and firearms lawfully sought . . . Even if the search warrant provided justification for a cursary examination of the box and its contents, when the officers examined the contents of a bound, closed and outwardly inocuous columnar pad, they entered the impermissible realm of the exploratory search.

9. Since Agent Patterson readily admitted that he did not know the significance of the folded up piece of paper found in Appellant Castro's wallet, it was error to allow him to confiscate said piece of paper in the absence of such knowledge.

WHEREFORE, Appellants respectfully request this Honorable Court to grant a rehearing to consider the issues not previously addressed in the Court's original opinion.

Respectfully submitted,

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BY Ronald A. Dion
RONALD A. DION, ESQ.

I HEREBY CERTIFY that a true copy of the foregoing was this 12 day of June, 1979, mailed to Donald S. Modesitt, Assistant U.S. Attorney, Post Office Box 1308, Tallahassee, FL.

BY Ronald A. Dion
RONALD A. DION, ESQ.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5510

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CELIO SERGO CASTRO and
RALPH LEON ALFONSO,
Defendants-Appellants.

NO. 78-5660

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALBERT GREENE, JR.,
Defendant-Appellant.

Appeals from the United States
District Court for the
Northern District of Florida

ON PETITION FOR REHEARING

(July 18, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Celio Sergo Castro, Ralph Leon Alfonso and Albert Greene in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ (Illegible)
United States Circuit Judge